Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, et al.

Petitioners,

— v. —

JEFFREY A. LEVITT, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor,
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000

Counsel for Petitioners

**Counsel of Record*

Of Counsel:

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred in holding that federal courts do not have exclusive jurisdiction over civil actions brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and that state courts have concurrent jurisdiction over such actions.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Petitioners

A(1). Plaintiffs in No. 88-3019 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of George M. Lyon; Kent H. Butcher; Stanley Z. Felsenberg, M.D., Personal Representative of the Estate of Minnie Felsenberg; Margaret Graves; Thurman L. Graves; Sandra L. Pletka; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbet J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see* Amended Complaint in the United States District Court for the District of Maryland, No. B-87-668, ¶ 1, J.A. 25).

A(2). Plaintiffs in No. 88-3020 below:

Francine Tafflin; Seymour Zuckerman; Eris Zuckerman; Renalee Selvin; Joan Zuckerman; Sylvia Zuckerman; Seymour Zuckerman, Executor of the Estate of Samuel Zuckerman; George R. Lyon; George C. Lyon; Peter M. Lyon; Bruce K. Lyon; Elizabeth A. Lyon; George R. Lyon and Mary G. Lathrop, Personal Representatives of the Estate of George M. Lyon; Gertrude Durso; Enterprise Equipment Co., Inc.;* Carmen R. Goldings; Clelia S. Goldings; Ethan D. Goldings; Herbert J. Goldings, M.D.; Sarah M. Goldings; Doris Konig; Windell R. Carter; Catherine Carter; Mitchell W. Landy; and Rio Grande Savings & Loan Association,* individually and as representatives of a class of purchasers of Old Court certificates of deposit (*see*

Amended Complaint in the United States District Court for the District of Maryland, No. B-87-684, ¶ 1, J.A. 82).

Respondents

B. Defendants in Nos. 88-3019 and 88-3020 below:

Jeffrey A. Levitt; LCP Corporation; Allan H. Pearlstein; Jerome S. Cardin; Light Street Partnership; Allen Feinberg; Robert D. Pearlstein; Samuel Shoubin; Dennis E. Guidice; Karol Levitt; Rosemary Pearlstein; Old Court Savings & Loan, Inc.; Maryland Savings-Share Insurance Corp.; Maryland Deposit Insurance Fund Corporation; Charles C. Hogg, II; Paul B. Trice, Jr.; George W. H. Pierson; Jerome F. Dolivka; Francis F. Anderson; Michael J. Dietz; Leonard Bass; John C. Donohue, Sr.; Henry R. Elsnic; John D. Faulkner, Jr.; James D. Laudeman; Terry L. Neifeld; Glass and Associates, P.A.; Cardin and Cardin, P.A.; Venable, Baetjer & Howard; and David Uhlfelder.

---

*Pursuant to Supreme Court Rule 28.1, Petitioners state that neither Enterprise Equipment Co., Inc. nor Rio Grande Savings & Loan Association has any parent companies, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
CITATIONS TO OPINIONS OF COURTS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
I. FACTUAL BACKGROUND	2
II. PROCEDURAL HISTORY	5
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. INTRODUCTION	11
II. UNDER THE DECISIONS OF THIS COURT, JURISDICTION OVER A FEDERAL CIVIL CLAIM IS EXCLUSIVELY FEDERAL IF CONGRESS EXPLICITLY SO DIRECTS; IF THE LEGISLATIVE HISTORY CONTAINS AN UNMISTAKABLE INDICATION THAT JURISDICTION IS EXCLUSIVELY FEDERAL; OR IF A CLEAR INCOMPATIBILITY EXISTS BETWEEN FEDERAL INTERESTS AND CONCURRENT JURISDICTION	12
III. APPLICATION OF THIS COURT'S TEST FOR EXCLUSIVE JURISDICTION DEMONSTRATES THAT JURISDICTION OVER CIVIL RICO ACTIONS IS EXCLUSIVELY FEDERAL	20
A. A Review of RICO's Legislative History Demonstrates Unmistakably That Congress Intended That RICO Jurisdiction Should Be Exclusively Federal	20

	Page
1. RICO's Legislative History Shows That Congress Explicitly Intended To Provide In RICO The Same Procedural Remedies That Are Available To Private Litigants Under The Clayton Act	20
2. In Light Of Congress' Intent To Model RICO On The Clayton Act, As To Which Jurisdiction Is Exclusively Federal, Its Intent Is Unmistakable That Jurisdiction Over Civil RICO Actions Is Also Exclusively Federal	25
B. The Language, Structure, And Purposes Of RICO Are Incompatible With Concurrent State-Court Jurisdiction Over Civil RICO Actions	28
1. The Effective And Consistent Implementation Of The Federal Criminal Laws Requires That Jurisdiction Over RICO Remain Exclusively Federal	29
2. Concurrent State-Court Jurisdiction Would Lead To Increased Conflict And Inconsistency In The Interpretation Of RICO	33
3. RICO's Procedural Mechanisms Are Incompatible With Concurrent State-Court Jurisdiction	36
IV. RICO PRESENTS THE MOST COMPELLING CASE TO DATE FOR A FINDING OF EXCLUSIVE JURISDICTION	37
CONCLUSION	39
APPENDIX	

TABLE OF AUTHORITIES

Cases: Page

Abelman v. Booth, 21 How. (62 U.S.) 506 (1859) 31

Agency Holding Corp. v. Malley-Duff & Associates, 483 U.S. 143 (1987) ..... *passim*

Allen v. State Bd. of Elections, 393 U.S. 544 (1969) 26

Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59 (2d Cir. 1986) 6-7

Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545 (1983) 6

B. F. Hirsch v. Enright Refining Co., 751 F.2d 628 (3d Cir. 1984) 34

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1642 (1989) 34

Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271 (9th Cir. 1988) 34

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436 (1920) 25

Brandenburg v. First Maryland Savings and Loan, 660 F. Supp. 717 (D.Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988) 25

Brandenburg v. Seidel, 859 F.2d 1179 (4th Cir. 1988) ... 7, 8, 36, 37

Broadway v. San Antonio Shoe, Inc., 643 F. Supp. 584 (S.D. Tex. 1986) 9

Burford v. Sun Oil Co., 319 U.S. 315 (1943) 6, 7

Cacioppe v. Superior Holsteins III, Ltd., 650 F. Supp. 607 (S.D. Tex. 1986) 9

Cannon v. University of Chicago, 441 U.S. 677 (1979) ... 10, 25, 26-27

Cases: Page

Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Ins. Co., 600 F.2d 671 (7th Cir. 1979) 7

Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) 15-16, 38, 39

Chas. Kurz Co. v. Lombardi, 595 F. Supp. 373 (E.D. Pa. 1984) 9

Chivas Products, Ltd. v. Owen, 864 F.2d 1280 (6th Cir. 1988) 8, 29, 30, 33, 36-37

Cianci v. Superior Court, 40 Cal.3d 903 (1985) . 9, 24, 32, 36

Claflin v. Houseman, 93 U.S. 130 (1876) ..... *passim*

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 6, 7

Cotler v. Inter-County Orthopaedic Ass'n, 526 F.2d 537 (3d Cir. 1975) 7

County of Cook v. MidCon Corp., 773 F.2d 892 (7th Cir. 1985) 8

Dubroff v. Dubroff, 833 F.2d 557 (5th Cir. 1987) 8

Engel v. Davenport, 271 U.S. 33 (1926) 14

Felder v. Casey, 108 S. Ct. 2302 (1988) 19

Finkielstain v. Seidel, 857 F.2d 893 (2d Cir. 1988) 6

Freeman v. Bee Machine Co., 319 U.S. 448 (1943) 10, 25

Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 346 U.S. 485 (1953) 30-31

General Motors Corp. v. California State Bd. of Equalization, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1122 (1988) 6

Gilbert Family Partnership v. Nido Corp., 679 F. Supp. 679 (E.D. Mich. 1988) 35

Cases: Page

Greenstein, Logan & Co. v. Burgess Marketing, Inc., 744 S.W.2d 170 (Tex. Ct. App. 1987) 9

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) ..... *passim*

H.J. Inc. v. Northwestern Bell Telephone Co., 57 U.S.L.W. 4951 (U.S. June 26, 1989) 11, 29, 33-34

Hampton v. Long, 686 F. Supp. 1202 (E.D. Tex. 1988).. 9

Hathorn v. Lovorn, 457 U.S. 255 (1982) 19, 25

Hishon v. King & Spalding, 464 U.S. 69 (1984) 3

Hecht v. Malley, 265 U.S. 144 (1924)..... 26

Hoke v. E. F. Hutton & Co., 91 N.C. App. 159 (1988)... 9

Ideal Stencil Machine & Tape Co. v. Merchiori, 600 F. Supp. 185 (S.D. Ill. 1985) 9

Karel v. Kroner, 635 F. Supp. 725 (N.D. Ill. 1986)..... 9

Kartell v. Blue Shield of Massachusetts, Inc., 592 F.2d 1191 (1st Cir. 1979) 7

Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3d Cir. 1988) 34-35

Kim v. Pereira Enterprises, Inc., 694 F. Supp. 200 (E.D. La. 1988) 9

Kruse v. Snowshoe Co., 715 F.2d 120 (4th Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984) 7

Levinson v. American Accident Reinsurance Group, 503 A.2d 632 (Del. Ch. 1985) 9

In re Lewisville Properties, 849 F.2d 946 (5th Cir. 1988) . 32

Lorillard v. Pons, 434 U.S. 575 (1978)..... 25

Lou v. Belzberg, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1302 (1988) 8, 24, 36

Cases: Page

Luebke v. Marine National Bank, 567 F. Supp. 1460 (E.D. Wis. 1983)..... 9

McNally v. United States, 483 U.S. 350 (1970)..... 32

Main Rusk Associates v. Interior Space Constructors, Inc., 699 S.W.2d 305 (Tex. Ct. App. 1985)..... 8, 9

Maplewood Bank & Trust Co. v. Acorn, Inc., 207 N.J. Super. 590 (1985)..... 9

Marine Bank v. Weaver, 455 U.S. 551 (1982)..... 6

Martinez v. California, 444 U.S. 277 (1980) 15, 19

Massey v. City of Oklahoma City, 643 F. Supp. 81 (W.D. Okla. 1986) 9

Masi v. Ford City Bank & Trust Co., 779 F.2d 397 (7th Cir. 1985) 34

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)..... 25

Mid-State Fertilizer Co. v. Exchange National Bank of Chicago, 693 F. Supp. 666 (N.D. Ill. 1988), *aff'd*, No. 88-2532 (7th Cir. June 19, 1989) 35

Middle South Energy Inc. v. Arkansas Public Service Comm'n., 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986)..... 7

Missouri ex rel. St. Louis Brownsville & Mexico Ry. v. Taylor, 266 U.S. 200 (1924)..... 14, 38

Nordberg v. Lord, Day & Lord, 107 F.R.D. 692 (S.D.N.Y. 1985) 9

Patsy v. Board of Regents, 457 U.S. 496 (1982) 19

Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211 (4th Cir. 1987) 34

Cases: Page

Printing Mart-Morristown, Inc. v. Rosenthal, 650 F. Supp. 1444 (D.N.J. 1987), *app. dismissed,* 833 F.2d 306 (3d Cir. 1987) 9

Rice v. Janovich, 109 Wash.2d 48 (1987) 9, 32

Ritchie v. Carvel Corp., No. 87 Civ. 8856 (S.D.N.Y. June 21, 1989) 9

Rogers v. Missouri Pacific Railroad, 352 U.S. 500 (1957) . 15

Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) 35

Rush v. Oppenheimer & Co., 628 F. Supp. 1188 (S.D.N.Y. 1985) 34

Second Employers' Liability Cases, 223 U.S. 1 (1912) .. 14, 38

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) .. *passim*

Shapiro v. United States, 335 U.S. 1 (1948) 26

Simpson Electric Corp. v. Leucadia, Inc., 72 N.Y.2d 450 (1988) 9, 25, 36

Smith v. MCI Telecommunications Corp., 678 F. Supp. 823 (D. Kan. 1987) 35

Spence v. Flynt, 647 F. Supp. 1266 (D. Wyo. 1986) 9

Sun Savings & Loan Ass'n v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) 32

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 16

Thrall Car Mfg. Co. v. Lindquist, 145 Ill. App.3d 712 (1986) 8, 9

United Energy Owners Committee v. United States Energy Management Systems, 837 F.2d 356 (9th Cir. 1988) . 34

United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), *cert. denied,* 459 U.S. 1105 (1983) .. 34

Cases: Page

United States v. Hartley, 678 F.2d 961 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983) 34

United States v. Tarble, 13 Wall. (80 U.S.) 397 (1872) ... 31

United States v. Turkette, 452 U.S. 576 (1981) 20-21

VanderWeyst v. First State Bank of Benson, 425 N.W.2d 803 (Minn. 1988), *cert. denied,* 109 S. Ct. 369 (1988) 9

Vickers v. Niesz, No. 88-CA-28 (Ohio App. February 17, 1989) 9

Village at Camelback Property Owners Ass'n v. Carr, 371 Pa. Super. 452, *appeal granted,* 519 Pa. 668 (1988) 9

Village Improvement Ass'n v. Dow Chemical Co., 655 F. Supp. 311 (E.D. Pa. 1987) 9

Washington Courte Condominium Association-Four v. Washington-Golf Corp., 150 Ill. App.3d 681 (1986) .. 8

Younger v. Harris, 401 U.S. 37 (1971) 6

Statutes:

15 U.S.C. § 15(a), Clayton Act, § 4 ..... *passim*

15 U.S.C. § 22 24

15 U.S.C. § 23 24

15 U.S.C. §§ 78 *et seq.,* Securities Exchange Act of 1934 5

15 U.S.C. § 78aa 6

15 U.S.C. § 78j(b) 5

18 U.S.C. § 1341 5

18 U.S.C. § 1343 5

Statutes:	Page
18 U.S.C. §§ 1961-68, Racketeer Influenced and Corrupt Organizations Act	2, 5
18 U.S.C. § 1961(1)(B)	29
18 U.S.C. § 1962	29
18 U.S.C. § 1962(a)	34
18 U.S.C. § 1962(c)	34
18 U.S.C. § 1964(c)	*passim*
18 U.S.C. § 1965	24, 36
18 U.S.C. § 1965(a)	36
18 U.S.C. § 1965(b)	36
18 U.S.C. § 1965(c)	36
18 U.S.C. § 1965(d)	36
18 U.S.C. § 3231	11, 30, 32, 33
20 U.S.C. § 1681, Education Amendments of 1972, § 901	26-27
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	3
28 U.S.C. § 1332	2-3
28 U.S.C. § 1441	35
29 U.S.C. § 185(a), Labor Management Relations Act of 1947, § 301(a)	15, 16
42 U.S.C. § 1973c	26
42 U.S.C. § 1983, Civil Rights Act of 1871	19
42 U.S.C. § 2000d, Civil Rights Act of 1964, § 601	26-27
43 U.S.C. §§ 1331 *et seq.*, Outer Continental Shelf Lands Act	17

Statutes:	Page
43 U.S.C. § 1333(a)(1)	17
43 U.S.C. § 1333(a)(2)	17
45 U.S.C. §§ 51-60, Federal Employers' Liability Act	14
46 U.S.C. § 688, Merchant Marine Act of 1920 (Jones Act) § 33	14
49 U.S.C. §§ 10103, 10730, 11707, Carmack Amendments to Interstate Commerce Act (Hepburn Act)	14
Constitutional Provisions:	
U.S. Const. Art I, § 8	37
Federal Regulations:	
17 C.F.R. § 240.10b-5, SEC Rule 10b-5	5
Legislative Materials:	
113 Cong. Rec. 17999 (1967)	23
115 Cong. Rec. 6993 (1969)	27
115 Cong. Rec. 6995 (1969)	23, 24
116 Cong. Rec. 27739 (1970)	22
116 Cong. Rec. 35204 (1970)	28
117 Cong. Rec. 30408 (1971)	27
Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. (1970)	22
Judiciary Act of 1789, 1 Stat. 73	30
Organized Crime Control Act of 1970, Pub. L. No. 9-452, § 904(a), 84 Stat. 941 (1970)	36

Other Authorities: Page

Blakey and Cessar, Equitable Relief Under Civil Rico: Reflections on Religious Technology Center v. Wollersheim: Will Civil Rico Be Effective Only Against White Collar Crime? 62 Notre Dame L. Rev. 526 (1987)... 35

Redish and Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L. Rev. 311 (1976) . 13

Report of the Ad Hoc Civil Rico Task Force of the ABA Section of Corporation, Banking and Business Law (1985)..... 22-23

The Federalist No. 82 (A. Hamilton) 13

Warren, *Federal Criminal Laws and the State Courts,* 38 Harv. L. Rev. 545 (1925) 30

No. 88-1650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANCINE TAFFLIN, et al.

Petitioners,

— v. —

JEFFREY A. LEVITT, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals is reported at 865 F.2d 595. The opinion of the District Court was delivered from the bench and has not been reported in any known official or unofficial reporter. The Opinions, Orders and Judgments issued by the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland are reproduced in the Appendix to the Petition for Writ of Certiorari at pp. A-1 through A-36.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 12, 1989. The Petition for Writ of Certiorari was filed on April 8, 1989, and this Court granted certiorari, limited to Question 2 presented by the petition, on May 30, 1989. This Court has jurisdiction to review the issues presented herein by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The verbatim text of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, is set forth in the Appendix to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The two consolidated actions below arise from the failure of Old Court Savings & Loan, Inc. ("Old Court") and the attendant collapse of the Maryland Savings-Share Insurance Corporation ("MSSIC"), a private corporation controlled by the Maryland savings and loan industry, the asserted purpose of which was to regulate that industry and to protect depositors and investors in Maryland savings and loan institutions, such as Old Court, which were not federally insured. The failure of Old Court resulted directly from a massive fraud and other wrongful acts committed by the officers and directors of Old Court, the officers and directors of MSSIC, and the other defendants. (¶¶ 51-101, J.A. 94-112.)[1] The allegations of plaintiffs' Amended

1. Throughout this brief, paragraph references will be to the Amended Complaint in Civil Action No. B-87-684 in the United States District Court for the District of Maryland. (J.A. 73-125.) (No. B-87-684 was designated as No. 86-0092 when the action was initially instituted in the United States District Court for the Eastern District of Pennsylvania, prior to its transfer to the United States District Court for the District of Maryland.) In No. B-87-684, the plaintiff class consists only of citizens of states other than Maryland, thereby vesting the District Court with diversity jurisdiction, 28 U.S.C. § 1332, as well as federal question jurisdiction, 28 U.S.C. § 1331, since all defendants are Maryland citizens. The other action involved herein, No. B-87-668 (which was No. 86-0090 in the Eastern District of Pennsylvania), includes Maryland plaintiffs in addition to plaintiffs from other states. (J.A. 15-72.) In all other respects the actions are identical.

Complaints, which must be taken as true on review of a motion to dismiss, *Hishon v. King & Spalding*, 464 U.S. 69 (1984), set forth the following facts.

Plaintiffs in the instant actions (Petitioners in this Court) purchased certificates of deposit from Old Court in reliance upon the purportedly insured status of the certificates and representations by Old Court and MSSIC that such investments were safe. (*See, e.g.*, ¶¶ 13-48, J.A. 84-93.) These representations were made in connection with a massive national advertising campaign orchestrated by Old Court's principals, and through the preparation and distribution by Old Court and MSSIC of numerous letters, brochures and other materials emphasizing the risk-free nature of investments and deposits at Old Court based upon the representation that they were fully insured up to $100,000 per account. (¶¶ 79-80, 82, J.A. 100-101.)

These representations were false. The advertisements and other representations relied upon by plaintiffs and the public were intended to create, and did create, the false impression that Old Court certificates of deposit were safe investments, insured by a governmental agency similar to the Federal Deposit Insurance Corporation ("FDIC") and the Federal Savings and Loan Insurance Corportion ("FSLIC"). (¶ 83, J.A. 101.) Unknown to plaintiffs, Old Court's principals were using Old Court to raise large amounts of capital to dispose of and invest for their own personal benefit, through the generation of cash by selling Old Court certificates of deposit both inside and outside the State of Maryland. (¶¶ 75-79, J.A. 99-100.)

Moreover, while MSSIC was held out as a "regulator" of the Maryland savings and loan industry, it actually functioned as a captive agent of that industry and of Old Court in particular, participating in and covering up Old Court's fraud on the plaintiffs and other investors. (¶¶ 86-89, J.A. 104-107.) MSSIC

knew that Old Court certificates of deposit were not "safe" investments because, *inter alia,* several of Old Court's insiders were diverting substantial funds for their own use, Old Court was known by MSSIC to be a "habitual violator" of MSSIC's rules and regulations, and Old Court was making insider loans in amounts prohibited by MSSIC and state regulations. *Id.* In addition, MSSIC falsely represented to the public that its "insurance" was sufficient to protect each of the accounts at all of its 101 member savings and loan institutions, when in fact MSSIC had insufficient liquid assets to back up the claimed insurance. (¶ 90, J.A. 108-109.) Finally, MSSIC falsely implied that it was part of the government of Maryland and that it provided insurance comparable to that supplied by the Federal Government through FDIC and FSLIC. (¶¶ 90, 94, J.A. 108, 109-110.)

Each of the defendants participated in Old Court's fraud upon plaintiffs. (¶¶ 75-95, J.A. 99-110.) In addition, the various defendants knowingly and intentionally conspired with each other to cover up the fact that Old Court was being run solely for the benefit of those associated with it and that, as a result, Old Court was on the brink of financial disaster and was, in fact, insolvent. (¶¶ 84-99, J.A. 101-111.)

Ultimately, a run on Old Court took place, and Old Court was unable to meet the demands for withdrawals by its customers. On May 13, 1985, Old Court was placed in conservatorship and, on that day, an order was imposed in the conservatorship proceeding limiting withdrawals from Old Court to $1000 per account during each thirty-day period thereafter. (¶¶ 100-102, J.A. 111-112.) After approximately June 7, 1985, all withdrawals from all accounts at Old Court, including redemption of matured certificates of deposit, were prohibited, with a few minor exceptions, and the conservator announced that interest on the principal amount of mature certificates of deposit would accrue at the rate of 5½%, a rate considerably below the range of rates on the certificates themselves. (¶¶ 104-106, J.A. 112-113.) On or about November 8, 1985, the Old Court conservatorship proceeding was converted to a receivership proceeding in which the court entered an Order providing that owners of Old Court

certificates of deposit would not receive any interest on their certificates accruing after November 8, 1985. (¶¶ 107, 114, J.A. 113, 114.)

As a result of Old Court's collapse and its resulting failure to pay plaintiffs either the amounts they invested or the interest thereon, plaintiffs have been damaged and continue to be damaged. (¶¶ 112-117, J.A. 113-115.)[2]

II. PROCEDURAL HISTORY

In January, 1986, plaintiffs, individually and on behalf of two classes of purchasers of Old Court certificates of deposit, filed the instant actions in the United States District Court for the Eastern District of Pennsylvania, asserting claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, and the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78 *et seq.*, as well as various state law claims. The predicate acts which were alleged to form the pattern of racketeering activity were multiple acts of mail fraud, 18 U.S.C. § 1341, wire fraud, 18 U.S.C. § 1343, and securities fraud, 15 U.S.C. § 78j(b) and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

After the actions were filed in the Eastern District of Pennsylvania, all defendants responded with motions to dismiss and/or transfer the actions to the District of Maryland. On February 17, 1987, the District Court for the Eastern District of Pennsylvania transferred the cases to the District of Maryland.

Thereafter, the substantive motions of defendants to dismiss the case were renewed. Although a number of grounds in support of the motions were raised, only two of those grounds served as the basis for the decisions of the courts below. First, defendants asserted that the certificates of deposit purchased by plaintiffs were not securities as defined in the Exchange Act and

---

2. Since the filing of the Amended Complaints, plaintiffs and other depositors in Old Court have received some payments of principal, but have not received the full amount of their principal, nor have they received any interest.

this Court's decision in *Marine Bank v. Weaver,* 455 U.S. 551 (1982), and therefore that no claim could be asserted under that Act.

Second, defendants asserted that the District Court should abstain from adjudicating plaintiffs' claims and dismiss the two cases because of the existence of pending state court actions relating to the Maryland savings and loan crisis. In support of this assertion, defendants contended that, because plaintiffs had failed to state a claim under the Exchange Act, which is subject to the exclusive jurisdiction of the federal courts, 15 U.S.C. § 78aa, and because jurisdiction over plaintiffs' only other federal claim, the RICO claim, was not exclusively federal, abstention and dismissal were appropriate since plaintiffs' RICO claim and their state law claims would be cognizable in Maryland state courts.[3] Defendants contended that abstention was appropriate under *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976), and *Younger v. Harris,* 401 U.S. 37 (1971).

In response, plaintiffs asserted that they had a viable claim under the Exchange Act, and that abstention and dismissal were inappropriate because, *inter alia,* jurisdiction over plaintiffs' federal claims under both the Exchange Act and RICO was committed exclusively to the federal courts. Since jurisdiction was exclusively federal, compelling plaintiffs to assert those claims in state court would effectively deprive them of their claims.[4]

—3. Defendants also contended that plaintiffs failed to state a claim under RICO as well, but that issue was not resolved by either court below. (*See* Appendix to Petition for Writ of Certiorari, at A-11—A-29, A-1—A-10.)

4. This Court has held that abstention is improper under *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976) when plaintiffs have alleged claims for which jurisdiction resides exclusively in the federal courts. *See Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 559-560 (1983). Dismissal of a case on abstention grounds in the face of a claim for which jurisdiction is exclusively federal is clearly improper, since it leaves the plaintiff with no forum in which to vindicate rights guaranteed by federal law. *See Finkielstain v. Seidel,* 857 F.2d 893, 896 (2d Cir. 1988); *General Motors Corp. v. California State Bd. of Equalization,* 815 F.2d 1305, 1309 (9th Cir. 1987) (Kennedy, J.), *cert. denied,* 108 S. Ct. 1122 (1988); *Andrea*

The parties presented argument to the District Court on December 4, 1987. The court ruled from the bench that same day, dismissing both cases. (*See* Appendix to Petition for Writ of Certiorari, at A-11—A-29.) The District Court first held that plaintiffs had failed to state a cause of action under the Exchange Act because it found that the Old Court certificates of deposit were not securities. The court then considered the abstention issues raised by defendants, addressing first the question of whether state courts have concurrent jurisdiction over civil RICO causes of action. The court concluded that state courts have concurrent jurisdiction over civil RICO claims and, having decided that issue, determined that it was appropriate to abstain and dismiss the Amended Complaints under the doctrines set forth in *Burford, supra,* and *Colorado River, supra.* (*See* Appendix to Petition for Writ of Certiorari, at A-30—A-33.)

The Court of Appeals for the Fourth Circuit affirmed the District Court's Orders dismissing the actions in an opinion and judgment rendered on January 12, 1989. (*See* Appendix to Petition for Writ of Certiorari, at A-1—A-10, A-34—A-36.) The Fourth Circuit held that the Old Court certificates of deposit were not securities under the Exchange Act. With respect to the abstention issue, the Court of Appeals viewed its earlier decision in *Brandenburg v. Seidel,* 859 F.2d 1179 (4th Cir. 1988), as controlling.

Brandenburg was a case similar to the instant case,[5] in which depositors in a failed Maryland savings and loan had

---

Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59, 62-63 (2d Cir. 1986); *Middle South Energy, Inc. v. Arkansas Public Service Comm'n,* 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied,* 474 U.S. 1102 (1986); *Cotler v. Inter-County Orthopaedic Ass'n,* 526 F.2d 537, 542 (3d Cir. 1975). *See also Kruse v. Snowshoe Co.,* 715 F.2d 120, 124 (4th Cir. 1983), *cert. denied,* 465 U.S. 1065 (1984); *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Ins. Co.,* 600 F.2d 671, 676 (7th Cir. 1979). *Cf. Kartell v. Blue Shield of Massachusetts, Inc.,* 592 F.2d 1191 (1st Cir. 1979) (abstaining but retaining jurisdiction).

5. Although *Brandenburg* was also based upon the failure of a non-federally-regulated state savings and loan association in Maryland, the allegations upon which plaintiffs' RICO claims in the instant actions are based differ significantly from the claims of the *Brandenburg* plaintiffs.

asserted RICO claims and state law claims. The *Brandenburg* court held that *Burford* abstention was appropriate in view of Maryland's allegedly comprehensive scheme for the rehabilitation and liquidation of insolvent savings and loans. The court then addressed the plaintiffs' assertion that abstention was inappropriate because jurisdiction over civil RICO claims was exclusively federal. Concluding that jurisdiction was not exclusively federal, the *Brandenburg* court stated that "the state and federal courts share concurrent jurisdiction over civil RICO claims. Since this in turn means that the surrender of federal jurisdiction over the plaintiffs' [RICO] claims . . . will not result in the loss of any federal rights, we conclude that the district court did not abuse its discretion in dismissing the [RICO] claims under *Burford*." *Brandenburg*, 859 F.2d at 1195. Viewing *Brandenburg* as controlling, the Court of Appeals affirmed the District Court's decision herein dismissing plaintiffs' Amended Complaints.

Plaintiffs filed their Petition for Writ of Certiorari on April 8, 1989, presenting two questions for review: first, whether certificates of deposit such as those issued by Old Court are "securities" under the federal securities laws; and, second, whether jurisdiction over civil RICO claims lies exclusively with the federal courts. With respect to the RICO jurisdiction question, plaintiffs described the conflict among the federal courts of appeals[6] and the inconsistent results in the lower

6. *Compare Chivas Products, Ltd. v. Owen*, 864 F.2d 1280 (6th Cir. 1988) (finding exclusive federal-court jurisdiction) *with Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988) *and Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1302 (1988) (both finding concurrent jurisdiction). The Court of Appeals for the Seventh Circuit has indicated in *dictum* that it is leaning toward finding concurrent jurisdiction. *See County of Cook v. MidCon Corp.*, 773 F.2d 892, 905 n.4 (7th Cir. 1985). *But see Washington Courte Condominium Association-Four v. Washington-Golf Corp.*, 150 Ill. App.3d 681 (1986) (RICO jurisdiction exclusively federal); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App.3d 712 (1986) (same). Additionally, the Court of Appeals for the Fifth Circuit, in *Dubroff v. Dubroff*, 833 F.2d 557 (5th Cir. 1987), stated that, in its view, Texas courts would ultimately be likely to assume concurrent jurisdiction. *But see Main Rusk Associates v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (RICO jurisdiction exclusively federal); *see also Hampton v. Long*, 686 F. Supp. 1202 (E.D. Tex. 1988) (refusing to find concurrent jurisdiction in light of *Main Rusk*).

federal courts[7] and state appellate courts.[8] This Court granted certiorari, limited to the question of civil RICO jurisdiction, on May 30, 1989.

SUMMARY OF ARGUMENT

This Court, most recently in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), has held that jurisdiction to hear

7. *Compare, e.g., Cacioppe v. Superior Holsteins III, Ltd.*, 650 F. Supp. 607 (S.D. Tex. 1986); *Spence v. Flynt*, 647 F. Supp. 1266 (D. Wyo. 1986); *Massey v. City of Oklahoma City*, 643 F. Supp. 81 (W.D. Okla. 1986); *Broadway v. San Antonio Shoe, Inc.*, 643 F. Supp. 584 (S.D. Tex. 1986); *Nordberg v. Lord, Day & Lord*, 107 F.R.D. 692 (S.D.N.Y. 1985); *Ideal Stencil Machine & Tape Co. v. Merchiori*, 600 F. Supp. 185 (S.D. Ill. 1985) (all finding exclusive federal-court jurisdiction) *with Ritchie v. Carvel Corp.*, No. 87 Civ. 8856 (S.D.N.Y. June 21, 1989); *Kim v. Pereira Enterprises, Inc.*, 694 F. Supp. 200 (E.D. La. 1988); *Village Improvement Ass'n v. Dow Chemical Co.*, 655 F. Supp. 311 (E.D. Pa. 1987); *Karel v. Kroner*, 635 F. Supp. 725 (N.D. Ill. 1986); *Chas. Kurz Co. v. Lombardi*, 595 F. Supp. 373 (E.D. Pa. 1984); *Luebke v. Marine National Bank*, 567 F. Supp. 1460 (E.D. Wis. 1983) (all finding concurrent jurisdiction). *See also Printing Mart-Morristown, Inc. v. Rosenthal*, 650 F. Supp. 1444 (D.N.J.) (refusing to decide jurisdictional issue but dismissing case on ground that plaintiff should have raised its RICO claims in prior state-court action to avoid effect of New Jersey "claim preclusion" doctrine), *appeal dismissed*, 833 F.2d 306 (3d Cir. 1987).

8. *Compare, e.g., Levinson v. American Accident Reinsurance Group*, 503 A.2d 632 (Del. Ch. 1985); *Thrall Car Mfg. Co. v. Lindquist*, 145 Ill. App.3d 712 (1986); *Maplewood Bank & Trust Co. v. Acorn, Inc.*, 207 N.J. Super. 590 (1985); *Vickers v. Niesz*, No. 88-CA-28 (Ohio App. February 17, 1989); *Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170 (Tex. Ct. App. 1987); *Main Rusk Associates v. Interior Space Constructors, Inc.*, 699 S.W.2d 305 (Tex. Ct. App. 1985) (all finding exclusive federal jurisdiction) *and VanderWeyst v. First State Bank of Benson*, 425 N.W.2d 803 (Minn.), *cert. denied*, 109 S.Ct. 369 (1988) (expressing "serious reservations" about assuming concurrent jurisdiction) *with Cianci v. Superior Court*, 40 Cal.3d 903 (1985); *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450 (1988); *Hoke v. E. F. Hutton & Co.*, 91 N.C. App. 159 (1988); *Village at Camelback Property Owners Ass'n v. Carr*, 371 Pa. Super. 452, *appeal granted*, 519 Pa. 668 (1988); *Rice v. Janovich*, 109 Wash.2d 48 (1987) (all finding concurrent jurisdiction).

causes of action under federal statutes is vested exclusively in federal courts if there is an explicit directive to that effect by Congress in the legislation; if an unmistakable implication that Congress so intended is found in the legislative history; or if an incompatibility exists between federal interests and the exercise of jurisdiction over such causes of action by the states.

In the case of civil RICO actions, no explicit directive exists in RICO itself as to this question. However, the two alternative *Gulf Offshore* factors are squarely met by RICO and require a holding that jurisdiction over civil RICO actions is exclusively federal. The legislative history establishes beyond question that when Congress enacted RICO it did so expressly intending that the remedies granted thereby would be modeled on those available under the Clayton Act. In particular, section 1964(c) of RICO, the operative provision creating a civil cause of action, was consciously modeled upon section 4 of the Clayton Act, which has been held by this Court to give exclusive jurisdiction to the federal courts. *See Freeman v. Bee Machine Co.*, 319 U.S. 448 (1943). The language of the two statutes, with certain exceptions held by this Court to be immaterial, is virtually identical.

Under the teaching of *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and similar cases, an accepted standard of statutory interpretation, when construing a statute which does not specifically address the question at issue, is to refer to similar statutes on which Congress modeled the enactment being construed. Congress is presumed to be familiar with the decisional law construing the statute on which it modeled the new statute and, unless a contrary indication appears, to incorporate by reference that decisional law. This Court has already adopted this very method of statutory construction in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), and *Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987) with respect to RICO itself, using the Clayton Act model to guide its decisions on issues arising under RICO. Application of the Clayton Act model in this case compels a holding that jurisdiction over civil RICO actions is exclusively federal.

Moveover, there is a plain incompatibility between the exercise of state-court jurisdiction over civil causes of action under RICO and federal interests. RICO itself is a federal criminal statute, as are most of its underlying predicate acts, which are essential parts of a RICO cause of action. Congress has by statute expressly limited jurisdiction over criminal offenses against the United States to the federal courts. Its purpose in doing so is to confine adjudication of federal criminal laws to the United States District Courts to maintain consistency of interpretation and application. *See* 18 U.S.C. § 3231. Allowing state courts to adjudicate civil RICO claims, including the necessarily attendant interpretation and construction of federal criminal statutes as applied to the facts of each case, would expand enormously the number of courts considering important issues under federal criminal law. Such a result is completely inconsistent with the express intent of Congress that the federal courts alone should adjudicate federal criminal law.

RICO itself, as this Court pointed out in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 26, 1989), is an extremely complicated statute whose interpretation continues to evolve in the federal court system. Consistency of interpretation and predictability of this wide-sweeping statute is critical, especially in view of RICO's criminal applications.

Finally, Congress, in enacting RICO, adopted numerous procedural mechanisms, drawn from the Clayton Act, which enable private litigants and the government to pursue RICO claims effectively. These procedures are inconsistent with any assertion that the fifty state courts should have concurrent jurisdiction over civil RICO claims, because the procedural mechanisms are simply unavailable in state courts.

ARGUMENT

I. INTRODUCTION

The Court of Appeals' determination to affirm the District Court's decision to abstain and dismiss plaintiffs' Amended Complaints was predicated on its conclusion that civil actions

under RICO are within the concurrent jurisdiction of the state courts. (*See* pp. 7-8 above.) As will be demonstrated herein, that conclusion is inconsistent with this Court's prior precedents relating to the question of exclusive federal jurisdiction over cases arising under the laws of the United States and with the legislative history and purposes of RICO itself. The judgment of the court below should therefore be reversed.

II. UNDER THE DECISIONS OF THIS COURT, JURISDICTION OVER A FEDERAL CIVIL CLAIM IS EXCLUSIVELY FEDERAL IF CONGRESS EXPLICITLY SO DIRECTS; IF THE LEGISLATIVE HISTORY CONTAINS AN UNMISTAKABLE INDICATION THAT JURISDICTION IS EXCLUSIVELY FEDERAL; OR IF A CLEAR INCOMPATIBILITY EXISTS BETWEEN FEDERAL INTERESTS AND CONCURRENT JURISDICTION.

From the very beginnings of the United States, two propositions with respect to the judiciary power of the national government have been assumed to be true: first, that Congress can grant exclusive jurisdiction over cases arising under the Constitution, treaties and laws of the United States to the federal courts; and second, that the state courts can have concurrent jurisdiction with the federal courts over such cases if Congress does not grant exclusive jurisdiction to the federal courts. The principle was made clear by Alexander Hamilton:

> I mean not therefore to contend, that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation, to the federal courts solely, if such a measure should be deemed expedient; but I hold that the state courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of the opinion, that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. . . . When

> . . . we consider the state governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

The Federalist No. 82 (A. Hamilton).

Hamilton's views are by no means surprising in view of the Framers' specific decision to "give Congress the option whether to create lower federal courts." Redish and Muench, *Adjudication of Federal Causes of Action in State Court,* 75 Mich. L. Rev. 311, 314 (1976). Since it was not at all clear when the Constitution was written that any lower federal courts would be created, it was understood that "state courts would be competent to hear federal causes of action." *Id.*

The principle enunciated by Hamilton with respect to the question of exclusive federal jurisdiction was addressed for the first time by this Court in *Claflin v. Houseman,* 93 U.S. 130 (1876). In *Claflin,* this Court adopted Hamilton's view and set forth the test for determining when exclusive jurisdiction vests in the federal courts:

> [T]he general principle being, that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be *neither express nor implied,* the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it.
>
> * * * *
>
> The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed . . . but the result of these discussions has . . . been . . . to affirm the jurisdiction, where it is not excluded by express provision, or *by incompatibility in its exercise arising from the nature of the particular case.*

* * * *

> [W]here a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. This jurisdiction is sometimes exclusive by express enactment and sometimes by *implication*.

93 U.S. at 136, 137 (emphasis added) (citations omitted).

Under *Claflin*, in every case raising the question of exclusive federal jurisdiction, the inquiry is (1) whether Congress expressly conferred such exclusive jurisdiction; or, if not, (2) did Congress do so by implication; or (3) would concurrent jurisdiction be incompatible with the federal interests to be served by the underlying legislation. The *Claflin* test for determining whether, under a given federal statute, jurisdiction is exclusive in the federal courts has remained the law for over a century.

Subsequent to *Claflin* the Court applied the rationale of its decision in that case to *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. v. Taylor*, 266 U.S. 200 (1924), and *Second Employers' Liability Cases*, 223 U.S. 1 (1912). Each of those cases involved statutes giving a right of action for damages arising out of the negligence of common carriers. In *Second Employers' Liability Cases*, the Court held that actions under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, by an injured railroad employee and representative of a deceased employee for damages resulting in whole or in part from the employers' negligence could be brought in state court.[9] 223 U.S. at 57-59. In *Missouri v. Taylor*, the Court held that a claim under the Carmack Amendment to the Interstate Commerce Act (now codified at 49 U.S.C. §§ 10103, 10730, 11707), imposing liability on the ground of negligence on a common carrier for damage to property, was appropriately brought in state court. 226 U.S. at 208. Both of these cases, therefore, are instances in which the Court found concurrent jurisdiction where the causes of action,

9. The Court has also held, without any reference to *Claflin*, that jurisdiction under section 33 of the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688, which incorporates by reference the Federal Employers' Liability Act, is concurrent. *See Engel v. Davenport*, 271 U.S. 33 (1926).

while federal, were essentially based on common law negligence.[10] Thus, in each of these cases no Congressional intent to make jurisdiction exclusive and no incompatibility between state-court jurisdiction and the statutory purposes could be identified.

The most recent applications of the *Claflin* analysis were undertaken in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 413 (1981).[11] At issue in *Charles Dowd* was whether section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), which provides in relevant part that "suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States . . .", created exclusive jurisdiction in the federal courts over such actions. In making its determination, this Court reaffirmed the *Claflin* test and pronounced it "unmodified through the years." 368 U.S. at 508.

Application of the *Claflin* test to section 301(a) compelled the conclusion that the state courts had concurrent jurisdiction over actions brought under that statute. At the outset, the Court determined that Congress had not expressly made federal-court jurisdiction exclusive by virtue of the language of the statute providing that suits "may be brought in any district court." 368 U.S. at 506. The question was therefore presented whether Congress had intended by implication to create exclusive jurisdiction in the federal courts. 368 U.S. at 507.

In answering this question, the Court considered the full legislative history of section 301(a). That consideration revealed

10. The Federal Employers' Liability Act did, of course, change the common law of employer liability generally applied at the time of its enactment by eradicating some defenses available to the employer. The fundamental issues that remain in all FELA cases, however, *i.e.*, whether the employer was negligent and, if so, whether the "negligence played any part, however small, in the injury or death which is the subject of the suit," *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 508 (1957), are ones which derive from common law principles with which state courts are familiar.

11. *See also Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) and note 13 *infra* p. 19.

not only that Congress had not intended to make jurisdiction under section 301(a) exclusive but, on the contrary, intended to *expand* the forums in which suits could be brought in controversies between an employer and a labor organization. Congress did so because, prior to the enactment of section 301(a), while state courts had been open to traditional breach of contract actions such as those contemplated by section 301(a), they were at times inhospitable to such suits in the labor-management relations context because of the procedural difficulties that could be present in causes of action against labor organizations "by reason of their status as unincorporated associations." 360 U.S. at 510. Congress enacted section 301(a) to remedy this difficulty. For this reason, the Court concluded:

> The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.

368 U.S. at 508-09.[12]

On the facts of *Charles Dowd*, no implication that Congress had intended section 301(a) to be within the exclusive jurisdiction of the federal courts was possible, given the very purpose of the statute to expand the forums available for suit and the legislative history surrounding its enactment.

The next case before this Court presenting a question of exclusive jurisdiction was *Gulf Offshore Co. v. Mobil Oil Corp.*, *supra*. There, the Court reaffirmed the basic approach to the question of exclusive jurisdiction set forth in *Claflin* and *Charles Dowd*, and described the analytical framework to be used in determining whether federal-court jurisdiction over a federal statute is exclusive:

12. Although *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), had held that the applicable law to be applied under section 301(a) was federal common law, it also "emphasized that '[a]ny state law applied . . . will be absorbed as federal law.' " *Charles Dowd*, 368 U.S. at 507 (quoting *Textile Workers*, 353 U.S. at 457).

> In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. *Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.*

453 U.S. at 478 (emphasis added) (citations omitted).

In *Gulf Offshore*, the Court considered whether lawsuits arising under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ("OCSLA"), were subject to the exclusive jurisdiction of federal courts. Pursuant to the provisions of OCSLA, the outer continental shelf was declared to be "an area of 'exclusive federal jurisdiction.' " 453 U.S. at 479 (quoting 43 U.S.C. § 1333(a)(1)). Although all of the law under OCSLA was federal, it borrowed the " 'applicable and not inconsistent' " laws of states adjacent to the areas of the oceans comprising the outer continental shelf to act as "surrogate federal law" and to fill in the " 'gaps' " in the coverage afforded by federal law. 453 U.S. at 480-81 (quoting 43 U.S.C. § 1331(a)(2)).

The underlying litigation in *Gulf Offshore* was a personal injury action for injuries sustained by a worker on an oil-drilling platform located on the outer continental shelf off the coast of Louisiana. Pursuant to OCSLA, the personal injury law of Louisiana was "borrowed" to govern the plaintiff's action for the injuries he sustained. As this Court emphasized, the issue in *Gulf Offshore* involved only whether state courts had jurisdiction over actions under OCSLA that were governed by state law incorporated into OCSLA. The Court expressly reserved decision as to jurisdiction over suits involving provisions of OCSLA other than those incorporating state law. 453 U.S. at 480 n.7.

The Court first noted that OCSLA contained no explicit statutory directive mandating exclusive federal jurisdiction over

cases based upon borrowed state law. 453 U.S. at 478. Moreover, the Court found no "unmistakable implication" of exclusivity in the legislative history, nor did it find any incompatibility between federal interests and state-court jurisdiction over actions arising under OCSLA which utilized incorporated state tort law as the governing law, reasoning that:

> [t]he operation of OCSLA will not be frustrated by state-court jurisdiction over personal injury actions. The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims. *These factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law.* There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.
>
> Allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting OCSLA. A recurring consideration in the deliberations leading to enactment was "the special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families." Allowing state-court jurisdiction over these cases will allow these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive fora.

453 U.S. at 483-84 (footnotes and citations omitted) (emphasis added). Consequently, the Court held that state courts had concurrent jurisdiction to adjudicate cases which required the

application of substantive state law that had been incorporated into the federal statute as the governing standard. 453 U.S. at 484.[13]

Claflin, Charles Dowd, and *Gulf Offshore* establish that, in the absence of an express legislative grant of exclusive federal-court jurisdiction, the language, structure, legislative history, and underlying policies of the particular statute at issue must be examined to determine whether federal-court jurisdiction is exclusive. *See Gulf Offshore,* 453 U.S. at 484. Examination of those factors in *Charles Dowd* and *Gulf Offshore* revealed that Congress in fact intended state courts to have concurrent jurisdiction over the statutes which were at issue. As applied to RICO, such an examination reveals an unmistakable implication arising from the legislative history that Congress intended jurisdiction over civil RICO actions to be exclusively federal, and a clear incompatibility between the federal interests reflected in RICO and state-court jurisdiction. Together, these factors compel the conclusion that civil RICO actions are within the exclusive jurisdiction of the federal courts.

---

13. The only case in this Court to discuss *Gulf Offshore* with respect to the issue of exclusive jurisdiction was *Hathorn v. Lovorn*, 457 U.S. 255 (1982). While *Hathorn* reaffirmed the *Gulf Offshore* principles, the Court found it unnecessary to apply them because the narrow issue before the Court was whether state courts could decide collaterally issues arising under section 5 of the Voting Rights Act. Consistent with prior case law, the Court held that state courts could decide such issues collaterally. 457 U.S. at 266 and n.18.

It should also be noted that the Court in *Felder v. Casey,* 108 S. Ct. 2302 (1988), stated that jurisdiction over claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, is concurrent in federal and state courts. 108 S. Ct. at 2307, 2311 (citing *Patsy v. Board of Regents,* 457 U.S. 496 (1982)). *See also Martinez v. California,* 444 U.S. 277, 283 n.7 (1980). The *Felder* Court did not apply the *Gulf Offshore* analysis, but apparently based its statement on a specific Congressional intent, expressly discussed by the Court in *Patsy,* that jurisdiction over section 1983 actions was to be concurrent. *See Patsy,* 457 U.S. at 506-07.

III. APPLICATION OF THIS COURT'S TEST FOR EXCLUSIVE JURISDICTION DEMONSTRATES THAT JURISDICTION OVER CIVIL RICO ACTIONS IS EXCLUSIVELY FEDERAL.

A. A Review of RICO's Legislative History Demonstrates Unmistakably That Congress Intended That RICO Jurisdiction Should Be Exclusively Federal.

1. RICO's Legislative History Shows That Congress Explicitly Intended To Provide In RICO The Same Procedural Remedies That Are Available To Private Litigants Under The Clayton Act.

The question presented to the Court in this case is whether section 1964(c) of RICO vests jurisdiction over civil RICO actions exclusively in the federal courts or concurrently in federal and state courts. Section 1964(c), which creates the RICO civil action, provides, in its entirety, as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c).

Over its past several terms, this Court has considered a number of questions arising under RICO, including section 1964(c) itself and, in doing so, has already reviewed much of the legislative history relevant to consideration of the issue present in the instant case. *See, e.g., Agency Holding Corp. v. Malley-Duff & Associates,* 483 U.S. 143 (1987); *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985); *United States v. Turkette,* 452 U.S. 476 (1981).

RICO represented a new federal effort to attack what was seen to be the serious national problem of expanding organized criminal activity. Accordingly, in *Turkette*, the Court based its holding with respect to the meaning of the term "enterprise" under RICO, at least in part, on its view of Congress' express

intent to provide in RICO remedies theretofore not available to attack organized crime:

> [T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." 116 Cong. Rec. 35217 (1970) (remarks of Rep. Eckhardt).

452 U.S. at 586-87.

As explained in *Sedima* and *Malley-Duff*, however, the remedies and accompanying procedures used in RICO were not wholly new; they were expressly modeled on the remedies available under the Clayton Act. In *Sedima*, the Court discussed at some length the legislative history of section 1964(c), concluding that "[t]he clearest current in [RICO's legislative] history is the reliance on the Clayton Act model . . .", 473 U.S. at 489, a conclusion reaffirmed in *Malley-Duff*, 483 U.S. at 151. In *Malley-Duff*, in fact, to demonstrate the point, the Court quoted section 1964(c) and section 4 of the Clayton Act, 15 U.S.C. §15(a), side by side to demonstrate the similarity of their language.[14] *See* 483 U.S. at 150-51. Importantly, the Court had

---

14. At the time RICO was enacted, section 4 of the Clayton Act provided:

> Any person who shall be injured in his business or property by reason of

earlier noted in *Sedima* that, although the language of the two sections differs in some respects, the differences are not material and do not detract from the essential identity of the provisions.[15]

The Court did not, however, base its holdings in *Sedima* and *Malley-Duff* only on the similarity of the language in RICO and the Clayton Act. It also relied upon the repeated statements of RICO's sponsors to the effect that Congress had expressly intended to follow the Clayton Act model when it enacted RICO. For example, Representative Steiger stated that the private treble damage section of what was to become RICO was "similar to the private damage remedy found in the antitrust laws . . ." *Sedima*, 473 U.S. at 489 (quoting Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., at 520 (1970)). Representative Steiger viewed the RICO civil enforcement remedy as a "parallel private . . . remed[y]" to the Clayton Act. 116 Cong. Rec. 27739 (1970) (letter to House Judiciary Committee), *quoted in Malley-Duff*, 483 U.S. at 152, and *Sedima*, 473 U.S. at 489 n.8.

The Court also pointed out that the American Bar Association had proposed an amendment, which was ultimately adopted in substance, "to include the additional civil remedy of authorizing private damage suits based upon the concept of section 4 of the Clayton Act." *Malley-Duff*, 483 U.S. at 152 (quoting Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., at 543-44 (1970)). The Court further noted that an early version of RICO proposed by Senator Hruska had explicitly adopted "antitrust concepts to thwart organized crime," *Malley-Duff*, 483 U.S. at 151 (quoting Report of the Ad

NOTES *(Continued)*

anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15. The Court suggested that the "language [used in RICO] was chosen simply because it is more succinct" and because it "is consistent" with other provisions in RICO. *See Sedima*, 473 U.S. at 489 n.8.

Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law, at 78 (1985) (hereinafter "RICO Task Force Report")), and that Senator Hruska viewed RICO as a means to utilize the "extraordinarily broad and flexible remedies" available under the antitrust laws in the fight against organized crime. *Malley-Duff*, 483 U.S. at 151 (quoting 113 Cong. Rec. 17999 (1967)); *see also Sedima*, 473 U.S. at 489 n.8.

The practical significance of the similarity in language and intent between RICO's section 1964(c) and section 4 of the Clayton Act is that it has enabled the Court to resolve issues arising under RICO by reference to the Clayton Act. Thus, in *Sedima*, the Court concluded that civil liability under RICO did not require a prior criminal conviction of an underlying predicate act or of RICO itself, in part because no such requirement existed under section 4 of the Clayton Act. *Sedima*, 473 U.S. at 489, 492. Similarly, in *Malley-Duff*, the Court held that the four-year Clayton Act statute of limitations would be applied to RICO. *Malley-Duff*, 483 U.S. at 156.

At the same time it is important to recognize that Congress did not adopt in RICO all of the substantive principles of antitrust law, such as the requirements of "antitrust standing" or "antitrust injury." The Antitrust Section of the American Bar Association, while strongly supporting "the use of the antitrust machinery as a weapon against organized crime," disagreed with the originally proposed concept of placing the new organized crime provision into the Sherman Act. 115 Cong. Rec. at 6995 (1969) (Report of Antitrust Section of the American Bar Association); *see Sedima*, 473 U.S. at 487, 498. The ABA's position was based upon its concern that private litigants seeking redress for injuries caused by organized criminal activity would be hampered in their efforts by the body of substantive precedent developed in the antitrust context, which set "strict requirements on questions such as 'standing to sue' and 'proximate cause.' " 115 Cong. Rec. at 6995 (1969); *see Sedima*, 473 U.S. at 498. The ABA proposed that the "antitrust-type enforcement and discovery procedures" that were planned to be used to combat organized crime be placed in a separate statute. 115 Cong. Rec. at 6995 (1969).

Congress adopted the ABA's recommendation. As enacted, RICO does not contain, nor is it subject to, the substantive body of precedent developed in the antitrust context governing "antitrust standing", "antitrust injury", or other elements of antitrust claims that have been developed by the courts over the past century. *See Sedima*, 473 U.S. at 498-99. That it does not, however, does not detract from the conclusion that Congress expressly modeled RICO's machinery and procedures upon those contained in the antitrust laws, adopting those procedural tools for use in the fight against organized crime. *See Malley-Duff*, 483 U.S. at 151-53; *see also* 115 Cong. Rec. at 6995 (1969). *Compare, e.g.*, 18 U.S.C. § 1965 (venue and process provisions of RICO) *with* 15 U.S.C. §§ 22, 23 (venue and process provisions of Clayton Act.)[16]

16. This distinction between procedure and substantive law has been virtually ignored by the courts that have erroneously read *Sedima* as having rejected the conscious patterning of section 1964(c) of RICO upon the Clayton Act for purposes of construing RICO. For example, in *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), the court, while recognizing that the issue in *Sedima* involved standing rather than jurisdiction, held that the similarity between RICO and the Clayton Act "does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Id.* at 737. See also *Cianci v. Superior Court*, 40 Cal.3d at 911-12. This statement, however, proves too much, since there is no question that RICO and the Clayton Act were not intended to be identical in all respects. However, the legislative history of RICO, as explained above, establishes the distinction made by Congress between importing substantive elements of antitrust claims into RICO and utilizing the well-proven machinery and procedural devices available under the antitrust laws to effectuate the substantive purposes of RICO. The foregoing courts failed to consider this critical legislative history, and thus misapplied *Sedima*. Petitioners submit that the principled distinction explained in the text correctly reflects the Congressional intent evidenced in the legislative history as well as this Court's previous interpretation of the statute. Conversely, the approach taken in the cases cited above ignores the importance of the relationship between RICO and the Clayton Act established by the legislative history and this Court's decisions in *Sedima* and *Malley-Duff*.

2. In Light Of Congress' Intent To Model RICO On The Clayton Act, As To Which Jurisdiction Is Exclusively Federal, Its Intent Is Unmistakable That Jurisdiction Over Civil RICO Actions Is Also Exclusively Federal.

Section 4 of the Clayton Act has long been held to confer exclusive jurisdiction on the federal courts. *See, e.g., Freeman v. Bee Machine Co.*, 319 U.S. 448, 451 n.6 (1943); *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.*, 252 U.S. 436, 440 (1920); *see also Hathorn v. Lovorn*, 457 U.S. 255, 267 n.18 (1982).[17]

Consistent application of the Court's approach to interpreting civil RICO in *Malley-Duff* and *Sedima, i.e.*, by reference to the conscious Congressional intent to model RICO on the Clayton Act, impels a ruling that the federal courts have exclusive jurisdiction over civil RICO actions because the Clayton Act has long been within the exclusive jurisdiction of the federal courts. This result is not only consistent with *Sedima* and *Malley-Duff*, but also with numerous other decisions of this Court, which has repeatedly taken the approach, in dealing with similar issues of statutory construction, that Congress must be presumed to have knowledge of a judicial interpretation of a prior law when it enacts a new statute with similar language. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982). Thus, by adopting the language used in section

17. Exclusive federal-court jurisdiction over the Clayton Act has remained unquestioned even though the operative language of section 4, which is identical to the corresponding language of section 1964(c) of RICO, provides that persons injured by violations of the respective statutes "*may* sue therefor" in any United States District Court. 15 U.S.C. § 15(a) (emphasis added). Accordingly, those courts that have purported to find significance in the use of the word "may" in section 1964(c), as opposed to another term such as "must" or "shall", erroneously failed to give sufficient consideration to the clear intent of Congress in modeling RICO upon the Clayton Act and its well-settled judicial interpretation. *See, e.g., Brandenburg v. First Maryland Savings and Loan*, 660 F. Supp. 717, 731 (D. Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988); *Simpson Electric Corp. v. Leucadia, Inc.*, 72 N.Y.2d at 457.

4 of the Clayton Act when it enacted section 1964(c) of RICO, "Congress 'must be considered to have adopted also the construction given by this Court to such language, *and made it a part of the enactment*.'" *Shapiro v. United States*, 335 U.S. 1, 16 (1948) (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)) (emphasis added).

The Court's decision in *Cannon* is particularly instructive. There, the Court compared the language of section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, with the language of section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, upon which section 901(a) of Title IX was patterned, in order to determine whether a private right of action could be maintained under section 901(a). Title VI had previously been held by lower federal courts to provide a private right of action. *See Cannon*, 441 U.S. at 696 and nn. 20 & 21. The Court noted that the statutes had similar administrative mechanisms and that neither statute contained an express provision for a private right of action. 441 U.S. at 695-96 and n.19. Significantly, however, by the time Title IX had been enacted, "the critical language in Title VI had already been construed as creating a private remedy." 441 U.S. at 696.[18] In light of the legislative history and the clear patterning of section 901(a) of Title IX upon the analogous provisions of section 601 of Title VI, the Court stated that when Congress drafted Title IX, Congress "explicitly assumed that [Title IX] would be interpreted and applied as Title VI had been," and concluded that:

> [i]t is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

18. The Court also noted that it had previously interpreted comparable language in section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, as providing a private remedy. 441 U.S. at 698 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)).

* * * *

> In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

441 U.S. at 696-99.

The *Cannon* analysis is directly applicable to the issue now before the Court. In *Cannon*, neither statute contained an express provision granting a private right of action; here, neither RICO nor the Clayton Act contains an express provision mandating exclusive federal-court jurisdiction. Title IX of the Education Amendments was consciously patterned upon Title VI of the Civil Rights Act of 1964; RICO's jurisdiction provision was consciously and explicitly patterned upon section 4 of the Clayton Act. In this regard, the comments of members of Congress as quoted and relied upon by the Court in *Cannon* are remarkably like that of the Congressional managers of the RICO legislation. *Compare* the remarks of Senator Bayh in commenting upon Title IX: "the same [enforcement] procedure that was set up and has operated with great success under the 1964 Civil Rights Act, and the regulations thereunder[,] would be equally applicable to discrimination [prohibited by Title IX]," *Cannon*, 441 U.S. at 696 n.19 (quoting 117 Cong. Rec. 30408 (1971)), *with* the similar remarks of Senator Hruska upon introducing an earlier version of the bill that became RICO (and that contained a civil remedy provision virtually identical to the one finally enacted): "The Bill is innovative in the sense that it vitalizes procedures which have been tried and proven in the antitrust field and applies them into the organized crime field where they have been seldom used before." 115 Cong. Rec. 6993 (1969).

Indeed, the legislative history of RICO provides even more compelling support for the presumption of Congressional knowledge of previous relevant judicial pronouncements than was present in *Cannon*, and demonstrates that for RICO, the presumption is in fact true. Representative McClory, who was a member of the House subcommittee which heard testimony on

the bill that became RICO, responded on the House floor during final consideration of the bill to critics who had suggested that the bill was poorly drafted that, "in my experience, no single measure has received more thorough consideration by a legislative committee than this bill. . . . *Precedents as contained in numerous court decisions were reviewed and weighed and every effort was made to produce a strong and effective tool with which to combat organized crime.*" 116 Cong. Rec. 35204 (1970) (emphasis added).

Thus, under this Court's longstanding approach to statutory interpretation and construction, Congress must be presumed both to have been aware of the prior judicial interpretation of section 4 of the Clayton Act, and to have expected section 1964(c) of RICO to be interpreted in the same fashion. Accordingly, the "unmistakable implication" of exclusive federal-court jurisdiction required by *Gulf Offshore* is plainly apparent in RICO's legislative history.

B. The Language, Structure, And Purposes Of RICO Are Incompatible With Concurrent State-Court Jurisdiction Over Civil RICO Actions.

As explained above, the only implication to be drawn from RICO's legislative history is a Congressional intention that civil RICO actions be subject to exclusive federal-court jurisdiction. This conclusion is strongly supported by an analysis of the overall structure of, and policies underlying, RICO's statutory scheme, which is incompatible with any viable concept of concurrent state-court jurisdiction. As discussed more fully below, in light of "[t]he federal policies at stake and the practicalities of litigation," *Malley-Duff*, 483 U.S. at 153, jurisdiction over civil RICO claims should be held to be exclusively federal.

1. The Effective And Consistent Implementation Of The Federal Criminal Laws Requires That Jurisdiction Over RICO Remain Exclusively Federal. –

This Court has recently described the operative provision of RICO, holding that the statute:

> imposes criminal and civil liability upon those who engage in certain "prohibited activities". Each prohibited activity is defined in 18 U.S.C. § 1962 to include, as one necessary element, proof either of "a pattern of racketeering activity" or a "collection of unlawful debt". "Racketeering activity" is defined in RICO to mean "any act or threat involving" state-law crimes, any "act" indictable under various specified federal statutes, and certain federal "offenses".

H.J. Inc. v. Northwestern Bell Telephone Co., 57 U.S.L.W. 4951 (U.S. June 26, 1989).

In enacting RICO, Congress chose to federalize certain state statutes, specifically those relating to murder, kidnapping, gambling, arson, robbery, bribery, extortion, and dealing in obscene matter or narcotics, while at the same time providing that the vast majority of violations which constitute predicate acts would be federal crimes. *See* 18 U.S.C. § 1961(1)(B). Indeed, the experience to date under civil RICO has been that:

> the large majority of civil RICO complaints use mail fraud, wire fraud or securities fraud as the required predicate offenses.

Malley-Duff, 483 U.S. at 149 (citing RICO Task Force Report at 56-57); *see also Chivas Products*, 864 F.2d at 1285 (great preponderance of civil RICO cases allege federal offenses of mail or wire fraud or federal securities fraud).

In every RICO case, the court, or a jury following the court's instructions, will be required to determine whether the requisite criminal conduct constituting the predicate acts has been committed. The predicate offenses of mail fraud, wire fraud, and securities fraud, as well as the majority of other predicate offenses, are complex federal criminal statutes with

which the state courts have had little or no experience. *See Chivas Products*, 864 F.2d at 1285. The reason that state courts have no experience with these predicate criminal acts is that Congress, in the Judiciary Act of 1789, 1 Stat. 73, committed jurisdiction over all federal crimes exclusively to the federal courts, where it has remained to this day.[19] The current version of the statute so doing is 18 U.S.C. § 3231, which provides as follows:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States . . . .

Congress' purpose in confining jurisdiction exclusively to the federal courts is readily apparent: to limit the number of courts in which the federal government's criminal laws would be interpreted so that the statutes would be uniformly applied and the federal criminal law could develop in a consistent and orderly fashion.

This Court has previously recognized this to be Congress' purpose in explicitly limiting jurisdiction over a given subject area to a specific tribunal. In *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 (1953), the Court considered whether a labor dispute plainly within the scope of the National Labor Relations Board ("NLRB") was also subject to the jurisdiction of a state labor relations act and of that state's courts. This Court held that states could not adjudicate such cases, reasoning that:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confine primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a

19. From time to time, some discrete federal criminal statutes have allowed concurrent jurisdiction. *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925).

> final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.

346 U.S. at 490-91.[20]

As in the context of the NLRB, Congress' exclusion of the state courts from jurisdiction over federal crimes evinces a Congressional intent to avoid the kind of "incompatible and conflicting adjudications" which the Court recognized would follow from state-court adjudication. 346 U.S. at 491. Thus, in evaluating the degree of incompatibility between the federal interests reflected in RICO and state-court jurisdiction, the issue is not simply whether state courts should be involved in the adjudication of RICO itself, *see infra* pp. 33-37, but also whether they should be involved in the interpretation and application of the numerous federal criminal statutes which comprise the great majority of the predicate racketeering offenses, and with which they are virtually completely unfamiliar.

Exclusive federal-court jurisdiction over federal criminal statutory offenses has led to consistent interpretations of those statutes in the federal courts as the federal criminal laws have evolved. If state courts are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and a resultant loss of control by the federal courts over the orderly development of federal criminal law. Congress

20. The need for such uniform application of criminal laws in particular has also been recognized by this Court, albeit in a different context. In *Abelman v. Booth*, 21 How. (62 U.S.) 506 (1859) and *United States v. Tarble*, 13 Wall. (80 U.S.) 397 (1872) this Court recognized the need for uniform application of the criminal laws, "for if left to the courts of justice in the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken." *Abelman*, 21 How. (62 U.S.) at 517-18.

has not delegated such authority to the state courts, and could not have intended such a disruptive result. With respect to civil RICO, "the desirability of uniform interpretation" and "the expertise of federal judges in federal law," *Gulf Offshore*, 453 U.S. at 484, is readily apparent.

Those courts that have analogized RICO predicate offenses to "garden variety fraud" or have pointed out that some of the RICO predicate acts are state crimes, and have concluded that there is, therefore, no incompatibility with state-court jurisdiction over RICO and federal interests, simply miss the point.[21] Congress chose to federalize certain state criminal law in RICO,[22] and by so doing, it created a new species of *federal* crimes and *federal* rights dependent on an interstate commerce nexus. *See Malley-Duff*, 483 U.S. at 153-54. Congress did not, however, by the mere inclusion of state-prohibited crimes in RICO, delegate to the state courts an entirely new responsibility for interpreting federal criminal law, and repeal *sub silentio* 18 U.S.C. § 3231. Concurrent state-court jurisdiction over civil RICO actions would, however, inevitably have the effect of altering the method by which federal criminal jurisprudence develops.

The federal criminal laws are constantly evolving, and their contours and definitions are subject to change as this Court and the twelve federal courts of appeals render new decisions. *See, e.g., McNally v. United States*, 483 U.S. 350 (1987). While the state courts are perfectly capable of applying precedent enunciated by this Court, they are not the judicial authority to which Congress has granted the exclusive authority to interpret and

21. *See, e.g., Cianci v. Superior Court*, 40 Cal.3d at 914; *Rice v. Janovich*, 109 Wash.2d at 55.

22. Importantly, however, "garden variety fraud" is *not* a predicate offense; mail fraud is, and, in civil RICO actions in which plaintiffs seek to characterize acts constituting "garden variety fraud" as mail fraud or wire fraud, as they must to make out a RICO claim, reference must constantly be made by the litigants and courts to the body of substantive law that has been and continues to be developed by the federal courts under those two federal criminal statutes to determine whether the alleged predicate acts in fact occurred. *See, e.g., In re Lewisville Properties*, 849 F.2d 946, 951 (5th Cir. 1988); *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 195-96 (9th Cir. 1987).

decide the parameters of the federal criminal laws in the first instance. A finding of concurrent jurisdiction would eviscerate the fundamental purpose of 18 U.S.C. § 3231 and alter the manner and method by which the federal criminal laws are interpreted and expounded. Absent an explicit Congressional directive, this Court should not interpret RICO in a manner which fundamentally changes the nature of our federal system.

2. Concurrent State-Court Jurisdiction Would Lead To Increased Conflict And Inconsistency In The Interpretation Of RICO.

Since the predicate acts which comprise a pattern of racketeering activity "will often occur in several States," *Malley-Duff*, 483 U.S. at 154, concurrent state-court jurisdiction would increase the risk of inconsistent adjudications in cases brought in different states by different plaintiffs, since:

> [s]tate courts have no multi-district litigation panel and no way to make their decisions on federal law consistent except through review by the Supreme Court. State court jurisdiction over the complex and ambiguous RICO statute would create the possibility of conflicting interpretations not only in the 12 regional federal courts of appeals but also in 50 states.

Chivas Products, 864 F.2d at 1285.[23]

Even among the federal courts, RICO has led to conflicting results in a number of areas. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951 (U.S. June 26, 1989), this Court was called upon to construe RICO's "pattern" requirement. The Court noted that the "plethora of different views" on the issue by the federal courts of appeals had demonstrated that "developing a meaningful concept of 'pattern' within the existing

23. In addition, most states have intermediate appellate courts, as well as courts of last resort. Often these intermediate courts have various divisions, and each division may not be bound by the decision of any other division. Accordingly, the potential for conflicting interpretations is even greater than that anticipated by the court in *Chivas Products*.

statutory framework has proved to be no easy task." 57 U.S.L.W. at 4952. Both the majority and the concurring Justices in *H.J. Inc.* expressed their concern with the lack of uniformity in civil RICO jurisprudence among the federal courts of appeals. *See id.*; *see also* 57 U.S.L.W. at 4957 (Scalia, J., concurring) (referring to "kaleidoscope of circuit positions").

Moreover, as Justice Scalia, writing the concurring opinion in *H.J. Inc.*, recognized, not only are "clarity and predictability in RICO's civil applications particularly important," but, in light of RICO's criminal aspects, even "its civil applications [must] possess the degree of certainty required for criminal laws." 57 U.S.L.W. at 4957-58 (Scalia, J., concurring).

The probability that concurrent state-court jurisdiction will result in an increased lack of uniformity of decision is increased by the number of unresolved issues that remain under RICO, including the application of the test for a "pattern" of racketeering activity set forth in *H.J. Inc.*; whether a RICO defendant can also be a RICO "enterprise" under sections 1962(a)[24] and 1962(c);[25] when a claim accrues under RICO for purposes of the statute of limitations;[26] and whether section 1962(a) requires that

24. *Compare, e.g., United Energy Owners Committee v. United States Energy Management Systems*, 837 F.2d 356, 364 (9th Cir. 1988) *and Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, 401-02 (7th Cir. 1985) (both holding that a RICO defendant can also be the "enterprise" under section 1962(a)) *with United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983) *and Rush v. Oppenheimer & Co.*, 628 F. Supp. 1188, 1196-98 (S.D.N.Y. 1985) (defendant cannot also be "enterprise" under section 1962(a)).

25. *Compare, e.g., B. F. Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984) (defendant must be separate from "enterprise" under section 1962(c)) *with United States v. Hartley*, 678 F.2d 961, 988-89 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170, 1183 (1983) (corporation may be simultaneously a defendant and the "enterprise" under section 1962(c)).

26. *Compare, e.g., Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (limitation period accrues when plaintiff has actual or constructive knowledge of acts causing injury) *with Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir. 1988) (action accrues when plaintiff knows or should know of existence of injury), *cert. denied*, 109 S. Ct. 1642, 1643 (1989) *and Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987) (same) *with Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130-33 (3d Cir. 1988) (action accrues from date plaintiff knew or should have known of last injury or last predicate act) *and Gilbert Family Partnership v. Nido Corp.*, 679 F. Supp. 679, 686 (E.D. Mich. 1988) (utilizing Clayton Act accrual rule).

an alleged injury be suffered as a result of the investment of proceeds of racketeering activity rather than by an underlying predicate act.[27]

Moreover, concurrent state-court jurisdiction would lead to increased forum-shopping and potentially greater docket congestion in both federal and state courts. For example, if a putative RICO plaintiff resides in a state in which the relevant decisions of state courts in that jurisdiction are contrary to decisions of federal courts in that district or circuit, the plaintiff could shop for the most desirable forum. *Cf. Malley-Duff*, 483 U.S. at 154 (discussing desirability of uniform federal statute of limitations to prevent the "danger of forum shopping"). In addition, if the plaintiff's claim is predicated in part upon an alleged violation of the Securities Exchange Act of 1934, under which jurisdiction is exclusively federal, the plaintiff might bring a RICO action in the more favorable state court and at the same time bring a separate action in federal court for the alleged securities violation, which would not be cognizable as a separate claim in the state court.[28]

27. *Compare, e.g., Rose v. Bartle*, 871 F.2d 331, 357-58 (3d Cir. 1989) (injury under section 1962(a) must have been caused by use or investment of income in RICO enterprise) *with Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 693 F. Supp. 666, 671-72 (N.D. Ill. 1988), *aff'd*, No. 88-2532 (7th Cir. June 19, 1989) *and Smith v. MCI Telecommunications Corp.*, 678 F. Supp. 823, 827-28 (D. Kan. 1987) (injury resulting from predicate acts rather than investment of racketeering proceeds is sufficient under section 1962(a)).

28. Moreover, contrary to the claims made by some courts, concurrent jurisdiction would not be likely to have an appreciable effect upon federal court dockets. Most of the RICO cases filed in federal courts have an independent basis of federal subject-matter jurisdiction, such as alleged securities fraud or diversity. *See* Blakey and Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White Collar Crime?* 62 Notre Dame L. Rev. 526, 534 n.29 (1987). In addition, most of the RICO claims filed in state courts could be removed to federal courts, 28 U.S.C. § 1441, thus further vitiating any

3. RICO's Procedural Mechanisms Are Incompatible With Concurrent State-Court Jurisdiction.

The broad procedural mechanisms contained in section 1965 of RICO, which provide, *inter alia*, for extended venue and service of process, are applicable only in federal court litigation. 18 U.S.C. § 1965. For example, section 1965(a) provides for venue "in the district court of the United States for any district" in which a defendant "resides, is found, has an agent, or transacts his affairs." Section 1965(b) empowers a federal court, in appropriate circumstances, to authorize process to be served in any judicial district of the United States. Section 1965(c) authorizes the service of subpenas to compel the attendance of witnesses "in the district court of the United States for any judicial district" in civil or criminal actions instituted by the United States. Finally, section 1965(d) provides that "[a]ll other process in any action or proceeding under [RICO] may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs."

In developing the overall statutory scheme, Congress granted to the federal courts these expanded powers, which provide those courts with enhanced ability to carry out RICO's statutory purposes, but which are non-existent in state courts. Consequently, concurrent jurisdiction over civil RICO claims would defeat the broad remedial purposes of the statute.[29] As the Court of Appeals for the Sixth Circuit has noted:

NOTES *(Continued)*

perceived benefit to federal court dockets by permitting concurrent state-court jurisdiction.

29. Congress has mandated that RICO be "liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970). However, to construe this mandate of liberal construction to require that civil RICO actions be permitted in state courts, as some courts have done, would turn the mandate on its head, because of the many procedural mechanisms designed to further RICO's remedial purposes which are completely unavailable in state courts. *See Chivas Products*, 864 F.2d at 1280; *cf. Brandenburg*, 859 F.2d at 1194; *Lou*, 834 F.2d at 737; *Cianci*, 40 Cal.3d at 916; *Simpson Electric*, 72 N.Y.2d at 458.

> [C]onsideration of [these] unique features of the RICO definitional and remedial structure demonstrates convincingly that state court jurisdiction would obstruct strong federal interests in uniform substantive and procedural enforcement of this integrated statutory scheme to control organized crime affecting interstate commerce.

Chivas Products, 864 F.2d at 1286.[30]

Under RICO, only the federal courts have sufficient procedural power to implement the purposes and objectives of the statute. Accordingly, concurrent state-court jurisdiction is not only incompatible with RICO's purposes, but would also impede the realization of those purposes by permitting suits in forums that are unable to implement fully the statutory scheme.

IV. RICO PRESENTS THE MOST COMPELLING CASE TO DATE FOR A FINDING OF EXCLUSIVE JURISDICTION.

As discussed above, an unbroken line of cases dating to *Claflin v. Houseman* has held that exclusive jurisdiction in the federal courts over a cause of action created by Congress will be found when Congress has expressed its intent either explicitly or implicitly that the statute in question be adjudicated in the federal courts, or when the federal interests underlying the statute are incompatible with the exercise of concurrent jurisdiction by the state courts. In each of the recent cases which have reached this Court with respect to the issue of exclusive federal jurisdiction, neither of these factors was present.

---

30. In *Brandenburg*, the court dismissed an argument based upon the exclusively federal venue and process provisions with the statement that "state courts retain the authority to promulgate procedural rules for their own courts, subject only to constitutional limitations." 859 F.2d at 1194. The Constitutional limitations to which the *Brandenburg* court adverted, however, including the requirement of due process, preclude the enactment by state courts of extensive venue and process provisions similar to those legislated by Congress in RICO pursuant to the Commerce Clause, U.S. Const. Art. I, § 8. Thus, state courts cannot properly effectuate Congress' intent to implement RICO's remedial scheme through the provision of such broad procedural tools.

In *Charles Dowd* and *Gulf Offshore, supra*, the Court concluded that Congress had expressed not a clear intent to oust the state courts from jurisdiction, but instead a contrary intention to expand the number of forums open and available to potential litigants in labor disputes and state law claims arising on the outer continental shelf. In view of this express Congressional intent, it would have been incongruous to hold in those cases that Congress had impliedly ousted the state courts of jurisdiction. In addition, the substantive rights at issue were historically and traditionally within the competence of the state courts.[31] In each case, a clear Congressional intent *against* exclusive jurisdiction was evident and Congress had acted to make the statutes in issue *compatible*, rather than incompatible, with state court jurisdiction.

RICO, in stark contrast, presents the very case, which this Court anticipated in *Claflin*, of a statute whose legislative history and express purpose demonstrate that Congress has committed it to the exclusive jurisdiction of the federal courts. The legislative history of RICO and the precedents of this Court establish that RICO was modeled on the Clayton Act. It is hornbook law that there is exclusive jurisdiction over the Clayton Act in the federal courts; thus, Congressional intent with respect to RICO unmistakably points to exclusive jurisdiction in the federal courts. In addition, the foregoing discussion has demonstrated the myriad difficulties, inconsistencies and incompatibilities which would arise if RICO were held to be within the concurrent jurisdiction of the state courts. In short, RICO is not a statute in which Congress has demonstrated an intention to confer or preserve state-court jurisdiction; nor is it a statute with which state-court jurisdiction is compatible. *See Gulf Offshore*

31. As explained above, older cases in which *Claflin* was applied involved similar situations. *See Second Employers' Liability Cases*, 223 U.S. 1 (1912), and *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. v. Taylor*, 266 U.S. 200 (1924), in which the Court held that Congress created causes of action based on principles of common law negligence to benefit specific classes of persons, including shippers or employees on common carriers in interstate commerce.

and *Charles Dowd*. Rather, RICO is a statute in which both of the *Claflin* tests for exclusive jurisdiction are squarely met.

As a consequence, this Court should conclude that civil actions under RICO are within the exclusive jurisdiction of the federal courts and, because the contrary conclusion was the basis for the decision of the court below, the judgment of the Court of Appeals should be reversed.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the Court of Appeals, order the Amended Complaints reinstated, and remand the matter for further proceedings consistent with its opinion.

Respectfully submitted,

M. Norman Goldberger

M. Norman Goldberger
Brian P. Flaherty
*Gary L. Leshko
WOLF, BLOCK, SCHORR
AND SOLIS-COHEN
Twelfth Floor,
Packard Building
15th and Chestnut Streets
Philadelphia, PA 19102-2678
(215) 977-2000

Counsel for Petitioners

**Counsel of Record*

Of Counsel:

Lawrence I. Weisman
306A Hampton Plaza
300 E. Joppa Road
Towson, Maryland 20204
(301) 583-9030

APPENDIX

APPENDIX – TABLE OF CONTENTS
TEXT OF STATUTES INVOLVED

Page

Racketeer Influenced and Corrupt Organizations Act

18 U.S.C. § 1961 ..... A-1

18 U.S.C. § 1962 ..... A-4

18 U.S.C. § 1963 ..... A-5

18 U.S.C. § 1964 ..... A-13

18 U.S.C. § 1965 ..... A-13

18 U.S.C. § 1966 ..... A-14

18 U.S.C. § 1967 ..... A-14

18 U.S.C. § 1968 ..... A-15

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in

property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which

occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the

investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both., , and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—
(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;
any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forefeiture under this section includes—

(1) real property including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1). Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the

interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of

innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisons of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for

violations of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be peformed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the Unted States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings

may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the

United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the

introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such material all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal

place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.